Supreme Court, U.S.
FILED
OCT 31 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-562

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FEDERAL LABOR RELATIONS AUTHORITY,
Petitioner

v.

NATIONAL TREASURY EMPLOYEES UNION and
UNITED STATES NUCLEAR REGULATORY COMMISSION,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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MEMORANDUM FOR THE NATIONAL TREASURY EMPLOYEES UNION

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MEMORANDUM FOR THE NATIONAL TREASURY EMPLOYEES UNION

STATEMENT

The National Treasury Employees Union (NTEU or Union), which has filed its own petition in this case at No. 89-198, submits this memorandum to support the petition for writ of certiorari filed by the Federal Labor Relations Authority (FLRA or Authority).

This case concerns the negotiability, under Title VII of the Civil Service Reform Act, 5 U.S.C. 7101 *et. seq.* (the Statute), of an NTEU bargaining proposal made to the United States Nuclear Regulatory Commission (NRC). Specifically, the Union proposed that the salaries of NRC

employees be adjusted by the cost of living/comparability figure proposed each year by the Advisory Committee on Federal Pay. The NRC has the authority, under section 161(d) of the Atomic Energy Act (42 U.S.C. 2201(d)), to fix the compensation of its personnel without regard to the laws establishing the General Schedule pay system, which specifically provides pay rates for most white-collar workers in the federal service. In 1975, the Commission exercised its discretion under section 161(d) to exempt its positions from the GS pay schedule. The NRC nevertheless refused to bargain over NTEU's pay adjustment proposal.

The FLRA and the Fourth Circuit panel originally ruling in this case both agreed with NTEU that its proposal was negotiable under the Statute. The Court of Appeals sitting en banc, however, concluded that the pay proposal was not negotiable.

NTEU filed a petition for certiorari at No. 89-198, presenting three questions, relating to 1) whether pay matters are negotiable "conditions of employment" under the Statute; 2) whether NTEU's pay proposal interferes with management's right to determine its budget; and 3) whether the proposal is inconsistent with the NRC's statutory authority to fix the compensation of its employees.

Since the filing of NTEU's petition, the Court has granted review of three questions in a similar case, *Fort Stewart Schools v. FLRA*, No. 89-65. *Fort Stewart Schools* presents 1) the same "conditions of employment" issue presented here, as well as similar issues regarding 2) the effect of a pay proposal on management's budget right; and 3) whether there is a "compelling need" for an Army rule, relating to the method for setting wages, that is inconsistent with the union pay proposal.

The FLRA in its petition in this case now presents precisely the same three questions as those contained in NTEU's petition at No. 89-165. The FLRA has argued

that, notwithstanding the grant of review in *Fort Stewart Schools*, both NTEU's and its own petition should be granted in this case and then consolidated with *Fort Stewart Schools* (Pet. 17, n.13).

DISCUSSION

NTEU supports the Authority's position, for the reasons fully discussed in the Union's own petition for certiorari in this matter. NTEU here makes only two brief additional points.

1. As the FLRA states in its petition (Pet. 17, n.13), the grant of review in *Fort Stewart Schools* is insufficient to justify deferring review in the instant case. If the Court's ultimate ruling in *Fort Stewart Schools* is in favor of the union on the first two issues, the decision would not dispose of the broad and important third issue here, which concerns the inconsistency between a pay proposal and an agency's statutory discretion to set its employees' wages.

An otherwise negotiable bargaining proposal is made non-negotiable under 5 U.S.C. 7117 if the proposal is either "inconsistent with any Federal law or any Government-wide rule or regulation" or is inconsistent with an agency regulation for which there is a "compelling need," as determined by the FLRA. 5 U.S.C. 7117 (a)(1); 7117(a)(2). *Fort Stewart Schools* does not raise the question of a purportedly inconsistent Federal law, but rather concerns an inconsistent agency regulation, for which there is an alleged "compelling need." Specifically, the Army has a regulation (which is inconsistent with the employee union's pay proposal) which provides that, "to the maximum extent practicable," salary schedules at dependents schools should be the same as salary schedules at comparable public schools in the State. Army Reg. 352-3, 1-7(h). In *Fort Stewart Schools*, therefore, this Court must decide a narrow issue regard-

ing whether there is a "compelling need" for the Army pay regulation for dependents schools.

Resolution of that "compelling need" issue would have little, if any, effect on the third issue presented here. The issue of this *NRC* case, in fact, is broader, and its resolution therefore would have an impact on a wider category of cases.

The third issue in this case is not limited to determining the "compelling need" for any regulation. Rather, the question is whether the pay proposal is inconsistent with the NRC's statutory discretion, under the Atomic Energy Act, to set its employees' wages. The lower court reasoned that, despite the NRC's 1975 unilateral decision to opt out of the GS pay schedule, the Agency did not have sufficient statutory discretion to negotiate over employee compensation. Resolution of this issue, therefore, would require the Court to articulate standards for measuring an agency's discretion to set wages and thus for determining what type of statutory discretion is truly inconsistent with pay proposals.

In sum, this case not only presents issues equally as worthy of review as those in *Fort Stewart Schools*, but presents a broader third issue, whose resolution would undoubtedly affect a larger class of cases. Review should be granted in this case, therefore, so that the Court may resolve the full panoply of issues related to pay proposals in the federal service.

2. The FLRA has expressed some reservation (Pet. 16, n.12) as to whether the en banc ruling below is the law of the circuit with respect to the second and third issues in this case. As NTEU noted in its petition, a 6-4 majority ruled that pay is never a negotiable "condition of employment," while five judges gave alternative grounds for rejecting the Union's proposal. The five-member plurality directly ruled that the pay proposal interferes with management's budget right and is inconsistent with the

agency's statutory authority under the Atomic Energy Act. One judge declined to reach these alternative grounds, while four judges dissented on these second and third issues.

The Authority's concern, which would not vitiate the need for review of these issues, in any event, is a purely academic one. A three-judge panel of the Fourth Circuit has expressly concluded that the alternative rulings of the plurality below are controlling. In *Charleston Naval Shipyard v. FLRA*, No. 88-2131 (4th Cir. Sept. 14, 1989), the court decided that the en banc court's *NRC* ruling regarding management's budget rights "clearly controls" the issue of a pay proposal's effect on an agency's right to determine its budget. The panel therefore applied the en banc alternative holding that a union proposal is non-negotiable if it would ultimately result in specific dollar amounts being added to an agency budget. Fourth Circuit law regarding the second and third issues in this case, therefore, is not in doubt. By virtue of *Charleston Naval Shipyard v. FLRA*, the alternative holdings below constitute the law of the circuit.

CONCLUSION

The petition for a writ of certiorari should be granted together with NTEU's petition at No. 89-198, and the case should be consolidated with *Fort Stewart Schools v. FLRA*, No. 89-65.

Respectfully submitted,

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